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Nos. 94-558 and 94-627

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In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, APPELLANT

v.

RAY HAYS, ET AL.

STATE OF LOUISIANA, APPELLANT

v.

RAY HAYS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether a State's intentional creation of a majority-minority district is always subject to strict scrutiny.

2. Whether the boundaries of District 4 in Louisiana's redistricting plan are so highly irregular on their face that they can be understood only as an effort to segregate voters into separate districts because of their race.

3. Whether District 4 is narrowly tailored to further a compelling interest.

PARTIES TO THE PROCEEDING

Plaintiffs are Ray Hays, Edward Adams, Susan Shaw Singleton and Gary Stokely.

Defendants are Edwin Edwards, Governor of the State of Louisiana; Samuel B. Nunez, President of the Louisiana State Senate, John A. Alario, Speaker of the Louisiana House of Representatives; W. Fox McKeithen, Secretary of State of Louisiana; and Jerry Fowler, the Commissioner of Elections for the State of Louisiana.

The United States intervened as a defendant.

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OPINIONS BELOW

The second opinion of the three-judge district court (J.S. App. 1a-23a) is reported at 862 F. Supp. 119. The first opinion of the three-judge district court (J.S. App. 39a-109a) is reported at 839 F. Supp. 1188.

JURISDICTION

The judgment of the three-judge court was entered on December 9, 1994. J.A. 9. A notice of appeal was filed on December 9, 1994. J.A. 233. This Court noted probable jurisdiction on December 12, 1994. J.A. 237. The jurisdiction of this Court rests on 28 U.S.C. 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause of the Fourteenth Amendment provides that "[N]o State shall * * * deny to any person within its jurisdiction the equal protection of the laws." The relevant federal statutory provisions are Sections 2 and 5 of the Voting Rights Act, 42 U.S.C. 1973, 1973c, which appear in the appendix to the jurisdictional statement at 117a-119a.

STATEMENT

This case concerns a challenge to the State of Louisiana's 1994 congressional redistricting plan. A three-judge court invalidated the plan after finding that it violated the standards for race-conscious redistricting established in *Shaw* v. *Reno*, 113 S. Ct. 2816 (1993).

1. The population of the State of Louisiana is more than 30% black. J.A. 179. From the end of Reconstruction until the 1980's, black voters were not in the majority in any of Louisiana's congressional districts, and no black person was elected to Congress. In 1983, a three-judge court invalidated Louisiana's 1982 congressional redistricting plan on the ground that it fragmented the minority population in the New Orleans area in violation of Section 2 of the Voting Rights Act, 42 U.S.C. 1973. *Major* v. *Treen*, 574 F. Supp. 325, 341 (E.D. La. 1983) (three-judge court). To remedy that violation, a plan was adopted in which blacks constituted

a majority in a district centered in New Orleans. Louisiana had a total of eight congressional districts in that plan. In 1990, a black candidate was elected to Congress from the New Orleans-based district.

Louisiana's congressional redistricting efforts were preceded by the State's redistricting of the Board of Elementary and Secondary Education (B.E.S.E.). Traditionally, the boundaries of the eight B.E.S.E. districts had been identical to the boundaries of the State's congressional districts. The new B.E.S.E. plan contained one majority-minority district. The State submitted the plan to the Department of Justice for preclearance under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. Acting on behalf of the Attorney General (28 C.F.R. 51.3), the Assistant Attorney General for the Civil Rights Division refused to preclear the plan. DX 16 (1993 Hearing). The Assistant Attorney General's objection letter noted that the B.E.S.E. plan had fragmented the minority population along the Mississippi River among three majority-white districts, that polarized voting by whites would preclude blacks from having an opportunity to elect a candidate of their choice in any of those districts, and that the State's black population was large enough and compact enough to constitute a majority in a second district that included the minority voters who lived along the Mississippi River. *Ibid.* The letter concluded that the State had not shown that its failure to create a second majority-minority district was free of discriminatory purpose. *Ibid.* In response to that objection, the State adopted a new B.E.S.E. plan that created two majority-minority districts, which the Assistant Attorney General then precleared.

As a result of the 1990 Census, Louisiana lost one of its congressional seats. J.S. App. 55a. In May, 1992, the

State legislature enacted a districting plan for the seven remaining seats. *Id.* at 39a. That plan included two majority-black districts. One was centered in New Orleans and was similar to the majority-black district in the plan used in the 1980s; the other (District 4) was a Z-shaped district that spanned a large part of the State. The State's plan was precleared by the Department of Justice.

Appellees, four voters living in Lincoln Parish, Louisiana, challenged that plan in 1992 on the ground that it segregated voters into districts on the basis of race, in violation of the Equal Protection Clause. J.S. App. 42a. The district court denied appellees' request for a preliminary injunction, and the 1992 congressional elections were held under the State's plan. *Ibid.* A black candidate was elected to Congress from District 4.

In December, 1993, following this Court's decision in *Shaw*, a three-judge court ruled in favor of appellees on the merits. J.S. App. 39a-109a. The court held that "[a] legislature creates a racially-gerrymandered districting plan when it *intentionally* draws one or more districts along racial lines or otherwise intentionally segregates citizens into voting districts based on their race." *Id.* at 48a. The court concluded that such an intent could be proven "*inferentially* * * * when districts are so bizarrely shaped that they presumptively bespeak an impermissible purpose." *Id.* at 50a. The court also concluded that such an intent could be shown "by *direct* evidence that a legislature enacted a districting plan with the specific intent of segregating citizens into voting districts based on their race." *Ibid.* The court found that appellees had proven racial gerrymandering in both ways. *Id.* at 51a.

Applying strict scrutiny, the court assumed that the State had one or more compelling interests in creating a

second majority-black district. J.S. App. 79a. The court went on to hold, however, that the State's plan was not narrowly tailored to further those interests for two reasons. First, the court found that District 4, which was 63% black in voting age population, contained more black voters than were "reasonably necessary to give blacks a realistic chance to determine the outcome of elections there." *Id.* at 83a-84a. According to the court, black voters would have an opportunity to elect the candidate of their choice in a district that is 55% black in voting age population. *Id.* at 84a. Second, the court found that "a second black majority district could have been drawn that would have done substantially less violence to traditional redistricting principles." *Id.* at 85a.

The State appealed. While that appeal was pending, the State enacted a new redistricting plan (Act 1), with a newly configured majority-minority District 4. The Department of Justice precleared Act 1. On June 27, 1994, this Court vacated the district court's judgment and remanded the case for further proceedings in light of the new plan. J.S. App. 2a.

2. Appellees filed an amended complaint, challenging Act 1 on equal protection grounds. J.S. App. 2a. The United States intervened to defend the plan. The court held a hearing on July 21 and July 22, 1994. *Ibid.*

The evidence at trial showed that the plan was drafted by legislative aide Glenn Koepp, based on instructions he received from two state senators with leadership roles on the State Senate redistricting committee. The two state senators told Koepp to devise a plan that would respect traditional redistricting values and avoid unnecessary packing of minority voters in accordance with the district court's 1993 decision, while still attempting to create a second majority-black district. J.A. 32-35, 105-106, 109, 120-121. To accomplish those

purposes, the senators suggested that Koepp model the district on congressional District 8 from prior redistricting plans. District 8 already had the second highest percentage of black voters of any district. J.A. 37, 87, 93-94, 105-106.

The State had used versions of old District 8 in every redistricting plan enacted between 1967 and 1992. J.S. App. 111a-114a. Old District 8 generally began in the western part of the State, included areas along the Red and Mississippi Rivers as it moved in a south-easterly direction, and ended beyond Baton Rouge. J.S. App. 111a-114a. Blacks are geographically concentrated in much of the area covered by the various configurations of old District 8, particularly along the Red and Mississippi Rivers. J.A. 38-39, 62, 82. In 1980, District 8 was 33.2% black; in 1990, it was 38.4% black. *Major* v. *Treen*, 574 F. Supp. at 328 n.3; J.A. 184. The area along the Red River Valley is also an important economic region and the people in that region share common interests. J.A. 71-72, 75-76, 196.

Using old District 8 as a model, Koepp devised new District 4. As Koepp explained it, "once I started working with it, * * * putting together parishes in the old Eighth, it got to be a district that was very close to a minority district." J.A. 41. And once Koepp extended the lines to Shreveport, the district was over 50% minority. *Ibid.* In devising the district, Koepp tried to keep small towns, precincts, and parishes intact, retain existing congressional districts as much as possible, reflect communities of interest, and place incumbents in separate districts. J.A. 35, 39-45, 107. To satisfy the one person, one vote rule and other objectives in the plan, 14 of Louisiana's 64 parishes were divided. J.A. 37, 45-46.

During State Senate redistricting hearings, Koepp displayed maps of various versions of old District 8 and

explained that they had been used as the basis for the new majority-minority district. J.A. 37-38, 164-178. The State House also held hearings and considered two additional plans similar to the one drafted by Koepp. SX 7 (maps, H.B. 8, 11); J.A. 194. The House was advised that those plans were also based on old District 8. J.A. 201. The House and Senate made several minor adjustments in Koepp's plan in the Lafayette and St. Landry area to satisfy an incumbent's concern about the political makeup of his district and to split fewer small towns. J.A. 55, 94-96, 197, 227.

As finally enacted, the new district begins in the northwest part of the State near Shreveport, runs diagonally southeast along the Red River to Alexandria, and then further southeast along the Mississippi River past Baton Rouge. J.S. App. 110a. The district is approximately 55% black in registered voters. J.A. 41.

In recent years, the cultural regions of Louisiana have become much less distinct and agricultural regions have become widely dispersed. J.A. 69-70. The adopted plan recognizes the State's geographic, economic, and cultural regions as well or better than any of the alternative plans considered by the legislature, including those with only one majority-minority district. J.A. 74-75, 84.

Voting in Louisiana is racially polarized, and blacks in Louisiana have not been elected either to Congress or the State legislature except from districts in which blacks have constituted a majority of registered voters. J.A. 65-67, 181-193. Aware of that reality, the State legislature created a second majority-minority district in order to comply with the requirements of Sections 2 and 5 of the Voting Rights Act, and to continue to remedy Louisiana's history of discrimination in voting. J.A. 41-43, 87-90, 104, 113-115, 202-219.

3. On July 22, 1994, the district court held the new plan unconstitutional. On July 25, 1994, it enjoined further use of the plan, and required 1994 and subsequent elections to be held under a plan drawn by the court. J.S. App. 24a-26a. The court's plan creates only one majority-black district; all other districts are less than 30% black in registered voters.

The district court issued an opinion explaining its decision on July 29, 1994. J.S. App. 1a-23a. The court found that "[t]he districting map of Louisiana, created under Act 1, reflects a racial gerrymander." *Id.* at 3a. The court specifically found that District 4 "cuts across historical and cultural divides, splits twelve of its fifteen parishes and divides four of the seven major cities of the State." *Ibid.* The court added that "[t]he statistical evidence showing the racial composition of the districts further supports the finding that District Four is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting." *Ibid.* (internal quotation marks omitted). That evidence, the court concluded, shifted the burden to the State to show that District 4 did not reflect a racial gerrymander. *Ibid.*

The court then found that the State had failed to satisfy that burden. J.S. App. 4a-5a. The court found that the State's assertion that the residents along the Red River had common interests was a "*post hoc* rationalization." The court also found that the State's claim that it had relied on the design of old District 8 was "mere pretext." *Id.* at 5a. In reaching those conclusions, the court relied in large part on the fact that "[t]he Senators themselves admitted that race played a large if not dominant role in the map as it is now drawn." *Id.* at 4a. The court also noted that old District 8 had never been challenged and that it was originally

created for the purpose of ensuring the reelection of an incumbent congressman. *Id.* at 5a. The court concluded that while "other factors" affected the way in which District 4 was drawn, the "*fundamental factor driving Act 1 was race.*" *Ibid.*

The court then held that "[r]ace-conscious redistricting, while not always unconstitutional, is always subject to strict scrutiny." J.S. App. 5a. The court noted that this Court had applied a more deferential standard to race-conscious redistricting in *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 430 U.S. 144 (1977) *(UJO)*. J.S. App. 5a. The court concluded, however, that *City of Richmond* v. *J. A. Croson Co.*, 488 U.S. 469 (1989), undermined the holding in *UJO*, and required strict scrutiny of all race-conscious redistricting. J.S. App. 6a.

The court went on to hold that the State had not proven that its consideration of race was supported by a compelling interest. J.S. App. 6a-7a. The court concluded that Section 5 "cannot be read to compel the results of Act 1" because there was no showing "that [the] failure to create a second majority-minority district would either be a retrogression of minority strength or have an illegal purpose." J.S. App. 8a. The court further concluded that a second majority-minority district was not compelled by Section 2 because proof of a "numerous and compact minority" is a precondition for a Section 2 dilution claim and "[t]he evidence convincingly proves that the State cannot clear [that] hurdle." J.S. App. 8a. Finally, the district court rejected the State's assertion that the creation of a majority-minority district furthered the State's interest in remedying its history of racial discrimination. *Id.* at 9a-10a. The court concluded that "[w]ithout concrete evidence of the lingering effects of past discrimination * * * we cannot

agree that the re-segregation of Louisiana by racially configured voting districts is warranted." *Id.* at 10a.

The court then addressed the question of remedy. It stated that it had adopted its own plan because of the need for prompt action and because the State had already failed twice to adopt a constitutionally acceptable plan. J.S. App. 10a.

Chief Judge Shaw issued a separate opinion in which Judge Wiener concurred. That opinion generally tracked the court's reasoning. J.S. App. 13a-23a.

On August 11, 1994, this Court stayed the district court order, permitting the 1994 congressional elections to proceed under the State's plan. On December 9, 1994, the district court reentered its judgment to cure a technical deficiency. On December 12, 1994, this Court noted probable jurisdiction.

SUMMARY OF ARGUMENT

I. A. The district court's holding that all race-conscious redistricting is suspect is inconsistent with *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 430 U.S. 144 (1977). In that case, five Justices agreed that the intentional creation of majority-minority districts is constitutional absent proof that the State's redistricting plan has the purpose and effect of diluting a racial group's voting strength. In *Shaw* v. *Reno*, 113 S. Ct. 2816 (1993), the Court held that race-conscious redistricting is suspect in those rare cases when the shape of a district is so highly irregular that it can be understood only as an effort to segregate the races for voting purposes. The Court in *Shaw* did not overrule *UJO*, but distinguished it on the ground that the plan at issue in *UJO* followed traditional districting practices. *UJO* therefore remains controlling when a State

intentionally creates majority-minority districts that are consistent with its traditional districting practices.

UJO is correct and should not be overruled. The district court's holding that all race-conscious redistricting is suspect deprives racial minorities who share common interests of the same opportunity to influence redistricting decisions that is accorded to other groups. It conflicts with the Court's holdings that plaintiffs challenging a decision on equal protection grounds must demonstrate a discriminatory effect. It fails to give sufficient weight to Congress's judgment that jurisdictions must be conscious of the racial consequences of their redistricting decisions. And it ignores the reality that those who redistrict are race-conscious because race often correlates with voting behavior.

B. A redistricting plan is suspect under *Shaw* only if it departs dramatically from the State's traditional districting practices. For that reason, the most salient fact in this case is that District 4 in the State's plan resembles District 8 in the plans that the State used between 1967 and 1992.

The district court erred in concluding that the State's admission that it intended to create a majority-minority district undermined the State's reliance on old District 8. The inquiry under *Shaw* is an objective one into whether the district is highly irregular when compared to districts drawn according to the State's traditional districting practices. Even if the State's intent were the ultimate issue, however, the State's admission that it intended to create a majority-minority district is not inconsistent with the State's assertion that it also took into account the traditional districting values that would be served by creating a district that resembled prior

districts. There is nothing suspect about that kind of balanced approach.

Isolated segments of District 4 are irregular in shape. The relevant inquiry, however, is whether the district as a whole is bizarre, not whether isolated segments of it are. District 4 reflects a con-scientious effort to create a majority-minority district while simultaneously pursuing other traditional Louisiana redistricting interests. It is therefore not suspect under *Shaw*.

II. In any event, the State's plan satisfies strict scrutiny because it is narrowly tailored to further the State's compelling interest in complying with the Voting Rights Act and ameliorating the present effects of racially polarized voting.

A. To establish a compelling interest in creating a majority-minority district in order to comply with the Voting Rights Act, the State was not required to prove that the Voting Rights Act ultimately mandated such a district. Rather, it was sufficient for the State to show that it had a sound basis for concluding that its failure to create a second majority-minority district would have led to a prima facie case against it under the Act. *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 500 (1989).

A State clearly has a sound basis for creating a majority-minority district to comply with Section 2 when (1) the minority group is sufficiently large and compact to constitute a majority in a district; (2) the minority group is politically cohesive; (3) whites usually vote sufficiently as a bloc to defeat the minority's preferred candidates; and (4) the failure to create a majority-minority district would leave the minority group substantially underrepresented when compared with the group's percentage in the population. *Thornburg* v. *Gingles*, 478 U.S. 30, 50-51 (1986); *Johnson*

v. *DeGrandy*, 114 S. Ct. 2647, 2658-2662 (1994). The State made each of those showings.

The district court found that blacks in the State are not sufficiently compact to constitute a majority in a second district. The relevant inquiry, however, is whether the proposed majority-minority district is reasonably compact in light of the State's traditional practices. Since District 4 is similar in compactness to districts drawn by the State in the same general area, the compactness requirement was satisfied.

The State also had a sound basis for believing that it would have difficulty satisfying its burden under Section 5 of showing that the failure to create a second majority-minority district was free of discriminatory purpose. In addition to the factors already discussed, the Attorney General had objected on discriminatory purpose grounds to a redistricting plan for the State Board of Elementary and Secondary Education, which had included one majority-minority district out of eight. The district court questioned the validity of that objection. Since there was no evidence that the objection was clearly insupportable, however, the State could properly rely on it.

The State also had a compelling interest in ameliorating the effect that racially polarized voting continues to have on the opportunity of minority voters to elect a candidate of their choice. Faced with the kind of extreme and pervasive bloc voting present in Louisiana, the State could properly seek to insure a fair allocation of political power.

B. The State's plan is narrowly tailored. It creates the number of majority-minority districts that its interests in complying with the Voting Rights Act and fairly allocating political power justify. It does not needlessly pack minority voters into the majority-

minority districts. And it gives sufficient weight to other redistricting interests.

ARGUMENT

I. LOUISIANA'S REDISTRICTING PLAN IS NOT SUBJECT TO STRICT SCRUTINY

A. Race-Conscious Redistricting Is Not Always Subject To Strict Scrutiny

In enacting its congressional redistricting plan, the State intended to create a second majority-minority district. The district court viewed that intent alone as a sufficient basis for subjecting Act 1 to strict scrutiny. The court's core holding was that "[r]ace-conscious redistricting, while not always unconstitutional, is always subject to strict scrutiny." J.S. App. 5a.

That holding is inconsistent with *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 430 U.S. 144 (1977). In *UJO*, the State "deliberately used race in a purposeful manner" to create majority-minority districts. *Id.* at 165. Seven of the eight Justices participating voted to uphold the State's plan without subjecting it to strict scrutiny. Five Justices specifically agreed that the intentional creation of majority-minority districts does not give rise to an equal protection claim, absent proof that it has the intent and effect of diluting the majority's voting strength. See *ibid.* (White, J. joined by Stevens, J. and Rehnquist, J.); *id.* at 179-180 (Stewart, J., concurring, joined by Powell, J.). Because the plan at issue in *UJO* was consistent with traditional redistricting principles, *id.* at 168, *UJO* did not resolve the question of what constitutional standard would apply to plans that departed from such principles in order to create majority-minority districts.

In *Shaw*, this Court addressed that issue, holding that a redistricting plan that is "so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting" is subject to strict scrutiny. 113 S. Ct. at 2824. Such a plan is constitutional only if it is narrowly tailored to further a compelling interest. *Id.* at 2825. The Court "express[ed] no view as to whether 'the intentional creation of majority-minority districts, without more' always gives rise to an equal protection claim." *Id.* at 2828. The Court did not, however, purport to overrule *UJO*. Instead, it distinguished *UJO* on the ground that the State in that case had "adhered to traditional districting principles." *Id.* at 2829. The Court also explicitly and repeatedly limited its holding to those "rare" cases in which districts are so highly irregular that they can be understood only in racial terms. *Id.* at 2824, 2825, 2826, 2828, 2830. The district court's holding in this case that Louisiana's intent to create a majority-minority district automatically triggered strict scrutiny is therefore in conflict with *UJO* and not supported by *Shaw*.

The Court's holding in *UJO* is correct and should not be overruled. That is true for several reasons. First, a holding that all race-conscious districting is automatically suspect would be inconsistent with the central purpose of the Equal Protection Clause—to insure equal treatment regardless of race. In most contexts, the principle of equal treatment is fully effectuated by considering each person as an individual, without regard to his or her race. *Metro Broadcasting* v. *FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J. dissenting). Redistricting, however, presents a different situation.

In adopting redistricting plans, States do not treat people as individuals, but as members of groups. Redistricting "inevitably has and is intended to have

substantial political consequences." *Gaffney* v. *Cummings*, 412 U.S. 735, 753 (1973). Because of those political consequences, groups with distinctive political interests seek to influence the way in which district lines are drawn. The groups participating in the redistricting process include not only political parties, groups with the same business interests, groups made up of people with similar socio-economic status, and issue-oriented groups, but also racial, ethnic, and religious groups. In redistricting, a State inevitably seeks to "reconcile the competing claims of [those] groups." *Davis* v. *Bandemer*, 478 U.S. 109, 147 (1986) (O'Connor, J., concurring in the judgment).

Under the Equal Protection Clause, a State must be free to give the same consideration to the claims of racial minority groups that seek to influence redistricting as to the claims of any other interest group. For example, if, as the district court indicated, a State may properly seek to accommodate the political interests of North Louisiana Irish, mainline Protestants, South Louisiana Catholics, and Creoles (J.S. App. 17a), it must have the same freedom to accommodate the political interests of blacks who live along the Red and Mississippi Rivers. If all race-conscious redistricting were subject to strict scrutiny, however, racial minority groups sharing common interests would have less opportunity to influence redistricting than other groups. That result cannot be squared with the central purpose of the Equal Protection Clause. As Justice Stevens has stated, "[i]f it is permissible to draw boundaries to provide adequate representation for rural voters, for union members, for Hasidic Jews, for Polish Americans, or for Republicans, it necessarily follows that it is permissible to do the same thing for members of the very minority group whose history in the United States gave birth to the

Equal Protection Clause." *Shaw*, 113 S. Ct. at 2844-2845 (Stevens, J., dissenting).

The holding in *Shaw* is not at odds with that conclusion. The showing required in *Shaw* to invoke strict scrutiny—that a majority-minority district is so highly irregular on its face that it can be understood only as an effort to segregate the races for voting purposes—indicates that the State has taken action on behalf of a racial minority group that it is unwilling to take on behalf of any other group. That sort of preference for racial interests triggers special equal protection concerns. When a State follows traditional districting practices in creating a majority-minority district, however, no such special concerns are raised.

The district court's holding that all race-conscious redistricting triggers strict scrutiny is also inconsistent with this Court's holdings that a plaintiff challenging a decision under the Equal Protection Clause must show that the decision has discriminatory consequences. *Davis* v. *Bandemer*, 478 U.S. at 127 (plurality opinion); *id.* at 161 (Powell, J., concurring in part and dissenting in part); *Hunter* v. *Underwood*, 471 U.S. 222, 227 (1985); *Palmer* v. *Thompson*, 403 U.S. 217, 224-225 (1971). *Shaw* did not eliminate that requirement. Instead, the Court there identified two race-based injuries that it believed could be traced to a plan that is so highly irregular that it can be understood only as an effort to segregate the races for voting purposes. The Court concluded that such a plan imposes harm because it conveys the message "that members of the same racial group—regardless of their age, education, economic status, or the community in which the[y] live—think alike, share the same political interests, and will prefer the same candidates at the polls." 113 S. Ct. at 2827. And the Court concluded that such a plan also inflicts harm

because "[w]hen a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole." *Ibid.*

Whether or not the Court was right in attributing those consequences to the creation of highly irregular districts (see 113 S. Ct. at 2848 n.9 (Souter, J., dissenting)), the Court did not suggest in *Shaw* that such effects would occur when the creation of a majority-minority district is consistent with traditional districting practices. To the contrary, the premise of *Shaw* is that "race-conscious redistricting that 'segregates' by drawing odd-shaped lines is qualitatively different from race-conscious redistricting that affects groups in some other way." *Id.* at 2838 (White, J., dissenting). As commentators have noted, the harms identified by *Shaw* flow from the fact that highly irregular majority-minority districts may convey the message to the public that race has submerged all other redistricting values—a message that is not conveyed by more regular majority-minority districts. Pildes & Niemi, *Expressive Harms, "Bizarre Districts," And Voting Rights: Evaluating Election-District Appearances After* Shaw *v.* Reno, 92 Mich. L. Rev. 483, 526 (1993); See also, Alenikoff & Issacharoff, *Race And Redistricting: Drawing Constitutional Lines After* Shaw *v.* Reno, 92 Mich. L. Rev. 588, 613-614 (1993) (extremely irregular majority-minority districts may be racially divisive in a way that more compact majority-minority districts are not).

Treating all race-conscious redistricting as automatically suspect also gives insufficient weight to Congress's judgment that States should be conscious of

the racial consequences of their redistricting decisions. Section 5 of the Voting Rights Act compels covered jurisdictions, like Louisiana, to create majority-minority districts when that is necessary in order to avoid retrogression in minority voting strength or when the failure to draw such a district would reflect purposeful racial discrimination. *Beer* v. *United States*, 425 U.S. 130, 140-142 (1976); *City of Richmond* v. *United States*, 422 U.S. 358, 378-379 (1975). Similarly, Section 2 of the Voting Rights Act requires all state and local jurisdictions to draw majority-minority districts if the failure to do so would lead to discriminatory "results." 42 U.S.C. 1973(a); *Thornburg* v. *Gingles*, 478 U.S. 30 (1986). To view the intentional drawing of majority-minority districts as suspect in all circumstances would ignore this legal context in which redistricting authorities must operate and would undermine Congress's decision to require such districts where necessary to avoid discriminatory results.

Such a rule would also place States in a legal straitjacket in which they would face litigation with minority voters if they do not create a majority-minority district and litigation from others if they do. The result would be the functional equivalent of a requirement that States and localities must preclear all their redistricting plans in federal court before they can safely implement them. It is one thing to put States in that position in the relatively rare circumstances in which they contemplate drawing highly irregularly-shaped majority-minority districts. It is another thing to create that dilemma every time a State or locality contemplates creating a majority-minority district.

Finally, as this Court noted in *Shaw*, "redistricting differs from other kinds of state decisionmaking in that the legislature always is aware of race when it draws

district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors." 113 S. Ct. at 2826. Because experience shows that race is often highly correlated with voting behavior, it is unrealistic to expect legislators to ignore that reality when they engage in the highly political task of redistricting. *Id.* at 2835 (White, J., dissenting) ("[I]t can hardly be doubted that legislators routinely engage in the business of making electoral predictions based on group characteristics—racial, ethnic, and the like."); *id.* at 2844 (Stevens, J., dissenting) ("Politicians have always relied on assumptions that people in particular groups are likely to vote in a particular way when they draw new district lines."). Thus, if legislators are candid in their discussions concerning redistricting plans, a holding that all race-conscious redistricting is automatically suspect would subject a very large number of redistricting plans at all levels of government to strict scrutiny. Cf. *Washington* v. *Davis*, 426 U.S. 229, 248 (1976) (noting that the consequence of treating all state laws with a discriminatory effect as suspect would be to raise serious questions about, and perhaps invalidate, a wide range of state laws).

In sum, the State's intent to create a second majority-minority district did not trigger strict scrutiny in this case. The district court erred in holding otherwise.

B. District 4 Is Not So Highly Irregular On Its Face That It Can Be Understood Only As An Effort To Segregate The Races For Purposes Of Voting

The district court also subjected the State's plan to strict scrutiny on the ground that District 4 was "so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for

purposes of voting." J.S. App. 3a. The court erred in reaching that conclusion as well.

1. The question whether a district is so highly irregular on its face that it can be understood only as an effort to segregate the races for purposes of voting is not a purely factual issue that a court can decide based entirely on intuition or aesthetic reactions. That inquiry must be guided by meaningful legal standards. Four principles are particularly important here.

First, the manner in which the State has drawn and continues to draw other districts is the most appropriate benchmark for determining whether a particular majority-minority district is "bizarre." See *Cane* v. *Worcester County, Maryland*, 35 F.3d 921, 927 n.6 (4th Cir. 1994), petition for cert. pending (No. 94-955); cf. *Jeffers* v. *Clinton*, 730 F. Supp. 196 (E.D. Ark. 1989), aff'd mem., 498 U.S. 1019 (1991). As previously discussed, a State should have the same leeway to accommodate the interests of racial minority groups with common interests as it has to accommodate other interest groups. For that reason, only majority-minority districts that are much more unusual in shape than districts drawn by the State to accommodate other political interests trigger strict scrutiny. Moreover, as previously noted, the Court in *Shaw* concluded that a district is suspect when it conveys a message that excessive consideration has been given to race. That perception will be shaped by how the State ordinarily redistricts, not by some model redistricting ideal. Practical considerations also necessitate reliance on the State's own redistricting standards. The only alternative to that approach would be a wholly subjective "I know it when I see it" test.

Second, *Shaw* described suspect districts as "extremely irregular" and "bizarre." 113 S. Ct. at 2824-

2825. Districts that are only "somewhat irregular" are not suspect. *Id.* at 2826. A district is therefore suspect under *Shaw* only if it departs dramatically from the State's traditional redistricting practices.

Third, *Shaw* held that a district is suspect only when it is so extremely irregular "on its face" that it can be understood only in racial terms. 113 S. Ct. at 2824. The terms "on its face" clearly mandate an objective inquiry into the nature of the district, not a subjective inquiry into the legislature's intent. *Johnson* v. *Miller*, 864 F. Supp. 1354, 1395 & n.2 (S.D. Ga. 1994) (Edmondson, J., dissenting), probable jurisdiction noted, Nos. 94-631, 94-797, 94-929; see also Pildes & Niemi, *supra*, 92 Mich. L. Rev. at 508.

Finally, the relevant inquiry under *Shaw* is whether the *district* is bizarre. The fact that isolated segments of a district are irregular does not make the district itself bizarre. *Vera* v. *Richards*, 861 F. Supp. 1304, 1345 (S.D. Tex. 1994), appeal docketed (No. 94-988).

2. Application of these legal standards leads to the conclusion that District 4 should not have been subjected to strict scrutiny. The most salient fact in this case is that District 4 resembles a majority-white district used in previous State redistricting plans. For 25 years (from 1967-1992), District 8 usually began in the western part of the State, included areas along the Red and Mississippi Rivers as it moved southeast, and ended beyond Baton Rouge. J.S. App. 111a-114a. District 4 includes the same general area. *Id.* at 110a. District 4 most closely resembles District 8 in the congressional plans used in 1967-1970 and 1971-1972. *Id.* at 112a, 113a. Because District 4 is consistent with the State's redistricting traditions, it is not suspect under *Shaw*.

In addition, the population along the Red River Valley which is included in District 4 shares common social and

economic interests. That evidence reinforces the conclusion that District 4 is not so irrational on its face that it can be understood only in racial terms.

Isolated segments of District 4 are irregular. But as we have discussed, the relevant inquiry under *Shaw* is whether the district as a whole is bizarre, not whether isolated segments of it are. When viewed as a whole, District 4 is not such a dramatically irregular departure from State districting practices as to make it suspect under *Shaw*.

3. The district court rejected the State's reliance on the fact that District 4 resembles old District 8 and encompasses a community of interest along the Red and Mississippi Rivers as "*post hoc* rationalization" and "mere pretext." J.S. App. 5a. In reaching those conclusions, the court relied in large part on the admissions of state legislators that race played a large role in the drawing of District 4. *Ibid.* As we have noted, however, *Shaw* mandates an objective inquiry into whether a district conveys the impression that racial considerations have been pursued to the exclusion of other redistricting values, not a subjective inquiry into the legislature's intent. The resemblance of District 4 to old District 8 and the presence of a community of interest along the Red and Mississippi Rivers are powerful objective indications that District 4 would not be understood as being driven by racial considerations to the exclusion of other redistricting values. Those factors are therefore of critical relevance in evaluating appellees' *Shaw* claim. Conversely, the fact that state legislators conceded that the State intended to draw a majority-minority district is not determinative of a *Shaw* claim. Under *Shaw*, there is nothing suspect about a State's desire to draw a majority-minority district.

Even if the legislature's actual intent were the relevant subject of inquiry, the district court misunderstood what the State sought to prove by introducing evidence that it modelled District 4 on District 8 and that it included persons in District 4 who had common interests other than their race. The point of that evidence was not to show that race played no role in the drawing of District 4; it admittedly played an important one. Rather, the point was to show that the State was attempting to draw a majority-minority district in a way that was consistent with other traditional redistricting interests. The State's acknowledgement that it intended to create a majority-minority district is not in any way inconsistent with its assertion that it also took into account the traditional districting values of using districts that resemble prior districts and including persons with common interests. That acknowledgement therefore provides no basis for the court's finding that the State's reliance on those other factors was pretextual.

In rejecting the State's reliance on old District 8, the district court also attributed significance to the fact that District 8 was "never challenged" and "was crafted for the purpose of ensuring the reelection of Congressman Gillis Long." J.S. App. 5a. Legislation that has not been challenged, however, is presumptively constitutional. *Voinovich* v. *Quilter*, 113 S. Ct. 1149, 1156-1157 (1993). Nor does it denigrate the State's reliance on old District 8 to note that the district was originally drawn to protect an incumbent congressman. To the contrary, that fact indicates that the shape of District 8 reflects the State's traditional districting practices. The district court therefore erred in failing to treat that district as a benchmark for determining whether District 4 reflected such a dramatic departure from the

State's traditional practices as to be suspect under *Shaw*.

4. The district court made only a conclusory finding that District 4 was bizarre. J.S. App. 3a. Chief Judge Shaw, joined by Judge Weiner, elaborated on why, in their opinion, District 4 should be viewed as bizarre. J.S. App. 15a-17a. Their reasons are unpersuasive.

Chief Judge Shaw first found that District 4 is not compact because it is 250 miles long and spans 14 parishes. J.S. App. 15a-16a. Other districts in the current State plan, however, are also long and span numerous parishes. District 6 is about 200 miles long and spans 18 parishes; District 5 is about 190 miles long and spans 17 parishes; and District 3 is about 175 miles long and spans 15 parishes. J.S. App. 110a. In the court's plan (J.S. App. 38a), District 4 is about 200 miles long and spans 12 parishes, and District 3 is about 175 miles long and spans 13 parishes. See also U.S. Exh. 4 (District 5 in 1969-70 plan contained 17 parishes; District 5 in 1971-1972 plan contained 19 parishes; District 5 in 1973-1982 plan contained 20 parishes). Because Louisiana is comparatively large and has 64 parishes, but only seven congressional districts, some of its districts will necessarily be long and contain numerous parishes. There is nothing bizarre or even unusual about that.

Judge Shaw next found that District 4 does not respect political subdivisions because it splits 12 parishes and four cities. J.S. App. 16a-17a. In Louisiana, however, parish and city lines have never been sacrosanct in congressional redistricting. The three plans used between 1971 and 1992 all divided seven parishes. U.S. Exhs. 4, 6; PX 5, J.S. App. 65a. The court's own plan divided six. Congressional redistricting plans throughout the twentieth century have split the city of New Orleans. The number of parishes and cities split by

District 4 does not constitute such an extraordinary departure from the State's usual redistricting practices as to trigger strict scrutiny.

Chief Judge Shaw also found that the State's plan did not follow the traditional principle of respect for commonality of interests because District 4 combines different ethnic, religious, and agricultural groups. J.S. App. 15a, 17a. Any plan with only seven districts in a State as diverse as Louisiana, however, must combine different groups in districts to some extent. As already noted, District 4 unites a large number of residents who share common economic and social interests. The State's decision to give greater weight to the commonalities of interest reflected in District 4 than to the ethnic, religious, and agricultural factors favored by Judge Shaw does not show that District 4 is bizarre.

In sum, suspect treatment is reserved for truly bizarre districts that, on their face, evidence a single-minded pursuit of racial goals, with little or no consideration for other districting values. District 4 is not such a district. It reflects an acknowledged effort to create a majority-minority district, while simultaneously pursuing other traditional Louisiana districting values. It is therefore not suspect under *Shaw*.

II. THE STATE'S REDISTRICTING PLAN SATISFIES STRICT SCRUTINY

Even if the district court were right in subjecting the State's plan to strict scrutiny, it erred in concluding that strict scrutiny was not satisfied. The State's plan is narrowly tailored to further the State's compelling interests in complying with the Voting Rights Act and ameliorating the effect that racial polarization has on the opportunity of minority voters to elect candidates of their choice.

A. The State Had Compelling Interests In Creating a Second Majority-Minority District

1. A State has a compelling interest in complying with Sections 2 and 5 of the Voting Rights Act. See *Shaw*, 113 S. Ct. at 2830. The district court did not suggest otherwise. Instead, it held that, for the State to invoke that compelling interest as a justification for its actions, there must be "findings of * * * statutory violations." J.S. App. 7a. The district court therefore reviewed the evidence *de novo* to determine whether the State's creation of District 4 was "compelled" by Section 2 or Section 5. J.S. App. 7a, 9a. Based on the application of that standard, the court found that the creation of District 4 was not justified by the need to comply with Section 2 or Section 5. J.S. App. 7a-9a.

The district court's approach is inconsistent with this Court's precedents. To invoke the Voting Rights Act as a justification for its actions, the State was not required to prove that the Act ultimately required the drawing of a second majority-minority district. Rather, the State was required to show only that it had a "strong basis in evidence" for its actions—a standard that is satisfied if the State had a sound basis for believing that its failure to draw a second majority-minority district would have led to a prima facie case against it. *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 500 (1989); *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion); *id.* at 292-293 (O'Connor, J., concurring); *Johnson* v. *Transportation Agency*, 480 U.S. 616, 652-653 (1987) (O'Connor, J., concurring in the judgment). That standard gives States a margin of safety that will encourage their voluntary compliance with the Voting Rights Act, while still insuring that States do not resort to race-based action casually or gratuitously. *Johnson*, 480 U.S. at 652-653 (O'Connor, J., concurring in the

judgment); *Wygant*, 476 U.S. at 290-291 (O'Connor, J., concurring). The actual violation standard adopted by the district court imposes an unfair burden of omniscience upon the States. *Shaw* v. *Hunt*, 861 F. Supp. 408, 439-440 n.26 (E.D.N.C. 1994). Under the correct standard, Louisiana's creation of a second majority-minority was justified by both Section 2 and Section 5.

a. In *Thornburg* v. *Gingles*, 478 U.S. 30, 50-51 (1986), the Court established three preconditions for a Section 2 vote dilution claim. Plaintiffs must show that (1) the minority population is sufficiently large and compact to constitute a majority in a single-member district, (2) the minority group is politically cohesive, and (3) whites usually vote sufficiently as a bloc to defeat the minority's preferred candidate. In *Johnson* v. *DeGrandy*, 114 S. Ct. 2647, 2658-2662 (1994), the Court further held that the extent to which the minority population has an opportunity to elect candidates in proportion to their percentage in the population is important evidence bearing on the ultimate issue whether a redistricting plan violates Section 2. 114 S. Ct. at 2664 (O'Connor, J., concurring) ("[A] court must always consider the relationship between the number of majority-minority voting districts and the minority group's share of the popu[illegible]ion."). In light of *Gingles* and *DeGrandy*, a State would clearly have a reasonable basis for creating a majority-minority district to comply with Section 2 when the State legitimately believes that each of the three *Gingles* preconditions could be established against it and when, without such a district, the minority group remains substantially underrepresented when compared to the group's proportion of the

population. See *Shaw* v. *Hunt*, 861 F. Supp. at 440-441 & n.28. [1]

The State made that showing here. There is overwhelming evidence that blacks are politically cohesive in Louisiana and that whites usually vote sufficiently as a bloc to defeat their preferred candidates. No black candidate has ever won election to Congress or the Louisiana legislature except from a district in which blacks have constituted a voting majority. In the five most recent primary and run-off elections in old District 8, more than 87% of the blacks, on average, supported the black candidate, while less than 10% of the whites, on average, supported that candidate. SX 15. In addition, since blacks constitute 30% of the State's population, creating only one majority-minority district out of seven (14%) would leave the minority population very substantially underrepresented when compared to that group's share of the population.

That leaves only the question whether the minority population is sufficiently large and compact to constitute a majority in a district. The district court found that no compact district could be drawn because the minority population outside New Orleans is too dispersed. J.S. App. 8a & n.4. The *Gingles* compactness requirement, however, does not demand compactness in any absolute sense. Rather, the question in circumstances like those presented here is whether the proposed majority-minority district is reasonably compact in light of a State's traditional districting practices. *Jeffers* v. *Clinton*, 730 F. Supp. at 207; *Cane* v. *Worcester County*,

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[1] In some circumstances, even when a State's existing plan provides proportional representation, the State may need to create an additional majority-minority district in order to comply with section 2. See *DeGrandy*, 114 S. Ct. at 7658-7676.

35 F.3d at 926-927 n.6. As already noted, District 4 (54% black) is similar in compactness to previous districts drawn by the State in the same geographic area. *Gingles* requires no more.[2]

Moreover, the question here is not whether plaintiffs bringing a Section 2 suit would necessarily have been successful in satisfying the compactness requirement, but whether the State could have legitimately believed that they would be. Given the similarity in compactness between District 4 and old District 8, the State acted reasonably in seeking to comply with Section 2.

b. The State also had a sound basis for concluding that the creation of a second majority-minority district was necessary to comply with Section 5. Section 5 forbids a jurisdiction from implementing a redistricting plan unless it can show that the plan has neither a discriminatory purpose nor a discriminatory effect. 42 U.S.C. 1973c. Thus, even when a redistricting plan is not retrogressive, a State cannot obtain preclearance unless it makes the further showing that the plan is free of discriminatory purpose. *City of Pleasant Grove* v. *United States*, 479 U.S. 462, 469, 471 & n.11 (1987); *City of Port Arthur* v. *United States*, 459 U.S. 159, 168 (1982); *City of Richmond* v. *United States*, 422 U.S. 358, 378-379 (1975).

In this case, the State reasonably concluded that it would be unable to satisfy its burden under Section 5 to show that a redistricting plan with only one majority-minority district was free of discriminatory purpose.

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[2] According to the district court, the State's expert "confirmed" that the minority population outside New Orleans was too dispersed to satisfy the compactness requirement. J.S. App. 8a n.4. In fact, however, the State's expert testified that District 4 was reasonably compact. J.A. 127.

The State could not ignore the fact that a three-judge court had found that the State's 1982 redistricting plan diluted black voting strength. *Major* v. *Treen*, *supra*. The State also knew that Louisiana voting remained racially polarized to an extraordinary degree. SX 15. And the State had previously drawn majority-white districts similar in shape and location to District 4. Those facts reasonably led the State to conclude that it would have difficulty showing that a failure to draw a second majority-minority district similar to District 4 was based on legitimate redistricting considerations rather than an intent to dilute the black vote.

The State could also take into account the fact that the Attorney General had already objected to its redistricting plan for the statewide Board of Elementary and Secondary Education (B.E.S.E.), a plan that had included only one majority-minority district out of eight. The Attorney General's objection letter stated that the State's B.E.S.E. plan had fragmented minority concentrations among three majority white districts, that this fragmentation had not been justified in terms of neutral districting principles, and that the application of such neutral principles would have resulted in two majority-minority districts. See DX 16 (1993 Hearing).

The district court apparently believed that the State could not rely on the existence of the Attorney General's objection to its B.E.S.E. plan, but was required to show that the objection was a legally valid one. J.S. App. 7a & n.3. That approach was incorrect. Congress has delegated to the Attorney General primary responsibility for evaluating whether state redistricting schemes in jurisdictions covered by Section 5 violate the voting rights of racial minorities. A State always has the option to seek preclearance in the District Court for the District of Columbia if the Attorney General

determines that the State's plan is discriminatory. But Congress clearly contemplated that the States would not always have to take that step before revising their plans to accommodate the Attorney General's objection. The whole point of permitting the States to seek administrative preclearance was to provide an expeditious alternative to district court preclearance actions. *McCain* v. *Lybrand*, 465 U.S. 236, 246-247 (1984). That benefit would be lost if the States could not generally rely on the Attorney General's "administrative finding" of discrimination. *Regents of the Univ. of Calif.* v. *Bakke*, 438 U.S. 265, 305 (1978) (opinion of Powell, J.) (Section 5 objection by the Attorney General is sufficient to give a state a compelling interest in taking race-based remedial action).

Moreover, Congress determined that substantive Section 5 determinations would be made by either the Attorney General or the District Court for the District of Columbia. *McCain* v. *Lybrand*, 465 U.S. at 246-247. Congress assigned local federal courts a limited procedural role in the Section 5 enforcement scheme—to enjoin voting changes that have not been precleared. *Allen* v. *State Board of Elections*, 393 U.S. 544, 558-560 (1969). As the Court explained in *Perkins* v. *Mathews*, 400 U.S. 379, 385 (1971), "What is foreclosed to such district court is what Congress expressly reserved for consideration by the District Court for the District of Columbia or the Attorney General—the determination whether a covered change does or does not have the purpose or effect 'of denying or abridging the right to vote on account of race or color.'" The effect of the district court's approach in this case is to transfer substantive Section 5 review from the Attorney General and the District Court for the District of Columbia to

local federal district courts in contravention of Congress's intent.

Because a State has its own responsibilities under the Equal Protection Clause, it may not defer entirely to the Attorney General's Section 5 analysis. Given the Attorney General's important role in the Section 5 statutory scheme, however, a State should be able to act on the assumption that the Attorney General has correctly objected to its plan, unless the objection is clearly insupportable. *Shaw* v. *Hunt*, 861 F. Supp. at 443 & n.34; see *UJO*, 430 U.S. at 175 (Brennan, J., concurring in part) (the Attorney General's judgment that a particular districting scheme complies with the remedial objectives of the Voting Rights Act is entitled to "considerable deference"); cf. *Presley* v. *Etowah County Comm'n*, 112 S. Ct. 820, 831 (1992) (a court must defer to the Attorney General's construction of Section 5, unless Congress has clearly expressed a contrary intent or the Attorney General's construction is unreasonable).

In this case, appellees have identified no such shortcoming in the Attorney General's B.E.S.E. objection. That objection, together with the evidence discussed above, reasonably led the State to conclude that its failure to create a second majority-minority district would be found to violate Section 5.

2. Independent of its obligations under the Voting Rights Act, the State also had a compelling interest in ameliorating the effect that racially polarized voting has on the opportunity for minority voters in Louisiana to elect the candidates of their choice. In *UJO*, Justices White, Rehnquist and Stevens stated that a State is not "powerless to minimize the consequences of racial discrimination by voters when it is regularly practiced at the polls." 430 U.S. at 167. Where such discrimina-

tion exists, a State may seek to achieve a "fair allocation of political power between white and nonwhite voters." *Ibid.* No other Justices in *UJO* addressed that issue. The analysis of the three Justices, however, is fully consistent with this Court's decision in *Croson*, which recognized that a State has a compelling interest in remedying identified discrimination within its jurisdiction, even when it has no federal statutory duty to do so. 488 U.S. at 491-493, 509. The approach of the three Justices in *UJO* should therefore be followed here.

Applying that analysis leads to the conclusion that polarized voting in Louisiana gives the State a compelling interest in creating a second majority-minority district. As we have noted, racially polarized voting in Louisiana is persistent and extreme. Based on the evidence before it, the State had every reason to believe that unless it created an additional district in which blacks constituted a majority, bloc voting by whites would preclude minority voters from having any realistic chance to elect a second representative of their choice and would leave them substantially under-represented compared to their percentage of the population. In those circumstances, the State had a compelling interest in creating a second majority-minority district in order to achieve a fair allocation of political power between white and nonwhite voters.

B. The State's Plan Is Narrowly Tailored To Further Its Compelling Interests

The district court's opinion does not address the issue of narrow tailoring. District 4, however, easily satisfies narrow tailoring standards.

Relying on *United States* v. *Paradise*, 480 U.S. 149, 171 (1987) (plurality opinion), courts have focused on three narrow tailoring requirements in the redistricting

context. First, a State may not create more majority-minority districts than either the Voting Rights Act or the State's interest in fairly allocating political power justify. *Shaw* v. *Hunt*, 861 F. Supp. at 446; J.S. App. 82a. Second, a State may not needlessly pack substantially more minority voters into a district than are reasonably necessary to give the minority group an opportunity to elect the candidate of its choice. *Ibid.* And third, a State may not create an extremely irregular district when a far more regular district would be equally effective in serving the State's compelling interest and the creation of the more compact district would not compromise the State's other legitimate redistricting interests.[3] J.S. App. 84a-87a.

The State's plan in this case does not run afoul of any of those requirements. The plan creates the number of majority-minority districts justified by the State's interests in complying with the Voting Rights Act and fairly allocating political power. Nor does the plan needlessly pack minority voters into District 4. Blacks constitute 55% of the registered voters in the district, very close to the minimum percentage necessary to provide minority voters with an opportunity to elect a candidate of their choice. J.S. App. 83a-84a. And for the reasons already discussed, the location and shape of District 4 is fully consistent with the State's traditional districting practices.[4]

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[3] As explained in our jurisdictional statement (at 11-14) in *United States* v. *Vera*, No. 94-988, the narrow tailoring principle does not require a State to draw the most compact district possible. A State may legitimately give priority to redistricting interests other than compactness, such as protecting incumbents.

[4] The State contends that the district court erred in imposing a permanent redistricting plan, without first giving the State a chance to propose a remedial plan. We agree. The court justified

CONCLUSION

The district court's judgment should be reversed.

Respectfully submitted.

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its decision to adopt its own plan on the ground that prompt action was needed and the State had already failed to adopt a constitutionally acceptable plan twice. J.S. App. 10a. Those factors might well have justified the court's decision to impose an interim plan for the upcoming elections. There was no justification, however, for the court's decision to impose a *permanent* plan without first affording the State a chance to propose its own plan. *Wise* v. *Lipscomb*, 437 U.S. 535, 539 (1978).